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IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1935.

PAUL V. MCNUTT, Governor of the State of Indiana,
PHILIP LUTZ, Attorney General of Indiana,
RICHARD A. MCKINLEY, Director of the Department of Financial Institutions of the State of Indiana,
OSCAR P. WELBORN, HARVEY B. HARTSOCK, C. M. SETSOR, MYRON GRAY and ROBERT BATTON, Members of the Commission of Financial Institutions of the State of Indiana,
HERBERT M. SPENCER, Prosecuting Attorney of the Nineteenth Judicial Circuit of the State of Indiana,

Appellants,

v.

MCHENRY CHEVROLET CO. INC.,

Appellee.

No. 710.

APPELLANTS' BRIEF.

INDEX.

SUBJECT INDEX.

	Page
TABLE OF CASES CITED	b
TABLE OF STATUTES CITED	c
OTHER CITATIONS	c
THE OPINION BELOW	1
STATEMENT OF THE CASE	2
The Conclusions of Law	2
The Act	3, 45
The Respective Claims of the Parties	3
The Basis of Appellants' Claim	3
The Factual Basis for Regulation (The Findings of Fact)	4
SPECIFICATION OF ERROR	8
Error No. 1	9
Error No. 2	9
Error No. 3	9
Error No. 4	9
SUMMARY OF ARGUMENT	10
Point 1	10
Point 2	10
Point 3	11
Point 4	11
Point 5	12
Point 6	13
Point 7	13
Point 8	14
Point 9	14
Point 10	14
Point 11	15
ARGUMENT	16
Point 1	16

PAGE

Point 2 26
Point 3 30
Point 4 31
Point 5 33
Point 6 34
Point 7 36
Point 8 37
Point 9 37
CONCLUSION 43

TABLE OF CASES.

Advance-Rumely Co. v. Jackson, 287 U. S. 283 14
Ashwander et al v. Tennessee Valley Authority No. 403-4, October Term, 1935 11
Blair v. United States, 250 U. S. 273 at p. 279 ..... 14, 37
Blue v. Beach, 155 Ind. 121, and authorities cited on p. 133 15
Brass v. North Dakota, 153 U. S. 391 ..... 12, 36
Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S. 238 at p. 245 12
Crowell v. Benson, 285 U. S. 22 at p. 62 ..... 11, 30
Dillingham v. McLaughlin, 264 U. S. 370 ..... 13, 36
Engle v. O'Malley, 219 U. S. 128 ..... 14, 37
Frisbie v. United States, 157 U. S. 160 36
German Alliance Ins. Co. v. Lewis, 233 U. S. 389 at p. 413 ..... 12, 13, 36
Griffith v. Connecticut, 218 U. S. 563 ..... 12, 13, 15, 36
Hall v. Geiger-Jones Co., 242 U. S. 539 12
Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U. S. 151 at 157 14
Hogg v. Ruffner, 66 U. S. 115 28

PAGE

Isenhour v. State, 157 Ind. 517 15
Munn v. Illinois, 94 U. S. 113 ..... 12, 13, 35
Mutual Loan Co. v. Martell, 222 U. S. 225 ..... 14, 15, 32, 39
Nebbia v. People, etc.,
291 U. S. 502 ..... 12, 13, 14, 15, 33, 35, 36, 38
Newkirk v. Burson, 28 Ind. 435 28
O'Gorman & Young v. Hartford Ins. Co., 282 U. S. 251 36
Panama R. Co. v. Johnson, 264 U. S. 375 at p. 390 ..... 11, 30
State, ex rel. v. Beil, 157 Ind. 25, at p. 29 15
U. S. v. Delaware Hudson Co., 213 U. S. 366, pp. 407-409 11
U. S. v. Jin Fuey Moy, 241 U. S. 394 11
Wallace v. Feehan, 206 Ind. 522 at p. 532 15

TABLE OF STATUTES CITED.

Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of the State of Indiana, sometimes cited as Retail Installment Sales Act, beginning on page 1206, Chapter 231, Acts 1935 45
Indiana Financial Institutions Act, Chapter 40, Sections 1 and 4 Acts of the 78th Regular Session of the General Assembly of the State of Indiana 4
Constitution of the United States, Section 1 of Article XIV of the Amendments 3
Judicial Code, Section 266, as amended on Feb. 13, 1925 (43 U. S. Statutes at Large 938, 28 U. S. C. A. 380) 2

OTHER CITATIONS.

Indiana Consumer Finance Agencies 4
Usury in Installment Sales, Vol. II, Law and Contemporary Problems, pp. 148-172 30

PAGE

Report of the State Banking Commission and Interim Advisory Legislative Committee to Investigate Finance Companies, 1935 32

Report of the Special Commission established to investigate the advisability of providing for licensing and regulation of the business of financing purchases of certain personal property January, 1936 33

The Wall Street Journal, February 21, 1936, p. 5, Column 1 33

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Appellee.

No. 710.

APPELLANTS' BRIEF.

I.

THE OPINION OF THE COURT BELOW.

No opinion was written by the court below.

II.

STATEMENT OF THE CASE.

This case was begun in the court below by the appellee by filing its Bill of Complaint in Equity, (R. pp. 1-28) seeking relief by injunction against the enforcement by the appellants of Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of the State of Indiana on the ground that said Act is unconstitutional.

A three-judge court was convened pursuant to Section 266 of the Judicial Code as amended on February 13, 1925, for the purpose of hearing appellee's application for an interlocutory injunction and the evidence was heard upon said application. (R. pp. 31, 47.) Thereafter, with the application for an interlocutory injunction undecided but not withdrawn, additional affidavits were introduced in evidence, upon which evidence including the affidavits introduced upon the application for an interlocutory injunction, the court found the facts specially and stated conclusions of law thereon and entered a final decree in harmony with such conclusions permanently enjoining the appellants from enforcing or attempting to enforce against appellee any of the provisions of said Act. (R. pp. 47-75.)

THE CONCLUSIONS OF LAW.

The court below did not write an opinion, simply stating its conclusions of law upon the facts found, to which conclusions appellants are obliged to go to ascertain the exact ground for the decree. These conclusions are as follows:

> "1. That Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of the State of In-

diana is unconstitutional and void in that it deprives complainant of its property without due process of law.

"2. That plaintiff is entitled to a judgment perpetually enjoining and restraining the defendants and each of them and their respective agents and employees from in any manner enforcing or threatening to enforce against complainant the provisions of said Act." (R. p. 74.)

THE ACT.

For the convenience of the court the Act assailed is set out in its entirety in appendix "A." This Brief pages 45-69.

THE RESPECTIVE CLAIMS OF THE PARTIES.

It was claimed by the appellee that said Act is unconstitutional and void in that it denies to it the rights guaranteed by Section 1 of Article XIV of the Amendments to the Constitution of the United States. The appellants, on the other hand, claimed and now claim that the Act does not violate the foregoing constitutional provision but is a valid exercise of the police power of the State.

THE BASIS OF APPELLANTS' CLAIM.

Briefly stated appellants' claim was based upon the following factual situations shown by the evidence and found by the court in its findings of fact, namely:

(1) The business of financing retail installment sales and the charge for the extension of credit involved therein including the method of "setting up" such charges were accompanied by abuses which were detrimental to the public welfare and, in the promotion of the public welfare, required regulation.

This need was emphasized by the further fact that by reason of the method employed the ordinary usury statute was wholly inadequate and unsuited to the correction of said abuses.

THE FACTUAL BASIS FOR REGULATION.

(*The findings of fact.*)

It is unnecessary in this statement to make a complete analysis of all the findings of fact which are quite lengthy. The following facts bear directly upon the legal questions involved:

(1) The Department of Financial Institutions is a department of government of the State of Indiana created under the Indiana Financial Institutions Act, Acts of the General Assembly 1933, Chapter 40, Sections 1 and 4. The function of the Department is to supervise, regulate and control the business of banks, trust companies, building and loan associations and other credit agencies, as well as small loan licensees furnishing money in amounts of $300.00 or less. From the time it was established on July 1, 1933, it received complaints from different persons directed against various types of financial institutions, and companies engaged in the business of appellee and those buying installment contracts and because of the complaints and in pursuance of its power of investigation, the Department began a study of consumer credit agencies operating in Indiana, the result of which was contained in a report published and presented to the 79th Session of the General Assembly of the State of Indiana, which report was entitled "Indiana Consumer Finance Agencies." The report was not limited simply to finance companies, but included all agencies theretofore under the supervision of the Department, in so far as those agencies and companies supplied credit to consumers, as well as installment

sellers who hold their own paper and companies engaged in the business of buying installment contracts. A considerable portion of the report was devoted to finance companies and what the report characterized as their "effective rates of interest for the extension of credit," the desirable and undesirable features of the business, as well as the undesirable features of instalment selling by dealers who hold their own paper, and the recommendations of the Department for legislation to restrict the original contract between buyer and seller, as well as supervise finance companies. (R. pp. 65, 66.)

(2) The variation of the amount of the finance company's discount for purchasing a retail instalment sale contract for twenty companies in Indiana on the identical unpaid balance of $300.00 on the purchase on instalments of a new automobile ranged from $28.00 to $60.00 for one year. *These amounts in terms of interest based upon the diminishing unpaid balance ranged from 18.7% to 44.4% per annum.* On used automobiles for the same unpaid balance for the same period of time the amounts ranged from $35.00 to $85.20, and *these amounts in terms of interest similarly computed ranged from 23.9% to 69% per annum.* These amounts included the cost of insurance for the retail buyer. The types of insurance coverage, the cost of which was included in these various amounts, is not disclosed by the evidence, nor the amount of the coverage. Insurance costs vary in amount according to types of coverage, make of car, zone in which kept and amount for which insured, and this variable factor and others mentioned such as credit risk, loss hazard, and cost of collection account for part of the variation in amounts, the extent of which can not be determined by the evidence. (R. pp. 67, 68.)

(3) Prior to the enactment of the Retail Instalment Sales

Act, the Act under consideration, the finance charge was represented to include cost of insurance, but *the actual cost of the insurance, as distinguished from the remaining part of the finance charge, might not be known to the retail seller or to the retail buyer.* (R. pp. 50, 51, 66, 67.)

(4) The form of contract supplied to the retail seller by the finance company contemplated the sale of the merchandise at whatever price was agreed upon by the parties and that price was known as "the time price." *No separate item appeared in the contract as the time price differential,* and the said differential included in the total time price was not translated into percentage calculations based upon the unpaid cash balance. (R. p. 67.)

(5) The Department of Financial Institutions in its report to the Governor and the General Assembly recommended that the cost of the credit extension, as the term is used in the report, be separated from the cost of insurance and expressed in terms of a rate per cent per month based upon the diminishing unpaid balance of the price of the merchandise. This recommendation was made to give the retail buyer a comparative cost basis. (R. pp. 69, 70.)

(6) Most finance companies furnish retail dealers with blank forms of conditional sale contracts, rate charts and work sheets, whereby the retail seller may easily compute the amount of the so-called time-price. *Some finance companies have many different rate charts for the same new car as well as for old ones.* (R. pp. 61-63.)

(7) The practice of rebating is engaged in by some finance companies. This is a practice whereunder, by special agreement with the retail seller, the finance company furnishes him

with its regularly authorized rate chart but agrees to and pays the retail seller a certain amount in cash on each contract accepted by the finance company. This amount goes to the retail seller without any restrictions whatsoever. *Any rebate paid to the dealer increases the so-called time-price to the buyer.* (R. pp. 70, 71.)

(8) The practice of adding to the finance charge an additional amount known as "dealers pack" exists only in the case of the instalment sale of automobiles. *This amount usually ranges from $10.00 to $25.00 although in some instances it may reach $40.00 or more. The retail buyer is not informed as to what this item is, and may be led to believe that the whole amount added to the unpaid balance, including the pack, is retained by the finance company. In practice, however, the finance company collects but does not retain the pack. It is collected by the dealer from the finance company at the time of the sale of the contract, or, in some instances after the contract has been fully paid, the amount is credited to the reserve account of the dealer with the finance company.* (R. pp. 70, 71.)

(9) Forms of contracts supplied to retail sellers by finance companies generally contain no provision for a return of any part of the finance charge to the buyer in the event he wishes to prepay the contract. Where the finance company has already paid the amount of the pack or rebate to the dealer, in order to re-imburse itself it must collect these amounts from the retail buyer. (R. pp. 71, 72.)

(10) Every finance company and retail seller recognizes that losses will occur and to compensate the finance company as assignee of the retail instalment contract and the retail seller as the original party thereto for such losses, there is included in

the differential or discount fixed by the finance company in the rate or payment charts, an amount which may be set aside as a reserve for losses. This amount is included in the differential or discount irrespective of the type of assignment which the finance company requires from the retail seller. Out of the reserve the retail seller and finance company are compensated for losses which occur, and a division of the item may be made between them according to the proportion of the risk of loss borne by each. (R. p. 64.)

(11) Appellee sells automobiles at what is known as a cash sale price, which in no instance exceeds $1,500 for one automobile, and also on the installment plan. From 60% to 65% of appellee's total sales have consisted of installment sales. (R. p. 49.)

(12) There are 843,066 families in the State of Indiana. Out of this number there are 700,000 families whose yearly income is less than $2400 each. There are 400,000 families whose yearly income is less than $1,000 each. The latter class of families constitute the largest class of purchasers of merchandise who use credit provided by means of retail instalment sales and contracts. (R. p. 73.)

III.

SPECIFICATIONS OF ERROR.

The ultimate error assigned is that the District Court erred in holding that Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of the State of Indiana is unconstitutional and void in that it deprives the appellee of its property without due process of law. The detailed specifications of

error (all of which are intended to be urged here) are set forth in the assignment of errors, and are as follows:

(1) The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in its first conclusion of law in said case in holding and deciding that Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of the State of Indiana is unconstitutional and void in that it deprives complainant of its property without due process of law.

(2) The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in its second conclusion of law in said case in holding and deciding that the complainant is entitled to a judgment perpetually enjoining and restraining the defendants and each of them and their respective agents and employes from in any manner enforcing or threatening to enforce against the complainant the provisions of Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of the State of Indiana.

(3) The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in its decree in granting and issuing the injunction herein.

(4) The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in failing to find as a fact and in disregarding the same in its conclusions of law and decree that the business whose regulation is provided for by Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of the State of Indiana is designed for use by and is used by a considerable portion of the people of the State in financing of retail instalment purchases; that such business and the methods of transacting the same operate to

the detriment of the retail instalment buyer who pays the cost of the supplying of capital by the finance companies to the retail dealers but who, instead of deriving benefit from the competition between finance companies for the retail dealers' business, are placed at a disadvantage by the concealment of "packs" and "bonuses" as a part of the finance charge and by other methods shown by the evidence; and that by reason thereof said business directly affects the public welfare and is subject to regulation under the police power. (R. pp. 76, 77.)

IV.

SUMMARY OF ARGUMENT.

1. The findings of fact show that the business regulated by Chapter 231 of the Acts of the 79th regular session of the General Assembly of Indiana is a proper subject of regulation by the state in the exercise of its police power. Findings Nos. 27-36 inclusive. (R. pages 66-72.)

The purpose of the Act, as is evident from a consideration of its provisions, is to prevent extortionate and unreasonable prices for credit extended in retail installment sales of goods of a sale price less than $1500 where the obligations of the sellers and buyers are evidenced by conditional sales contracts and by such other instruments as in the act are termed "retail installment contracts," and to prevent certain practices, in their nature fraudulent, which have arisen out of the combination of the retail seller and the finance company in the modern business of sales financing. Appendix "A," pages 45-69 of this brief.

2. It is not the purpose of the Act to fix the price of any goods sold by a retail seller and which is the subject of a retail

installment sale contract; nor can the Act be so construed as to exhibit such an intention of the legislature.

There is no provision in the Act under consideration which purports to fix or to authorize the fixing of the price of the merchandise. The Act expressly provides that the price of the merchandise referred to in the Act as the "cash price" means the price agreed upon by the parties without limitation as to the factors which may be taken into consideration in making the agreement. Appendix "A," page 46 of this Brief.

3. The foregoing construction, which is clearly expressed in the Act, operates as a complete avoidance of the constitutional pitfalls involved in the case of any attempt to fix the price of merchandise generally and makes the authorities on such subject wholly irrelevant; and if objection be made to the construction, such objection is fully met by the principle that the court, in the construction of a statute will, if possible, give it a construction in harmony with constitutionality.

Panama R. Co. v. Johnson, 264 U. S. 375 at p. 390;
United States v. Jin Fuey Moy, 241 U. S. 394;
United States v. Delaware Hudson Co., 213 U. S. 366 at pp. 407-408;
Ashwander et al v. Tennessee Valley Authority, No. 403-4, October Term 1935;
Crowell v. Benson, 285 U. S. 22 at p. 62.

4. The General Assembly of Indiana might well have considered that extortionate charges for credit in retail installment sales and the use of hidden excess charges as shown by the findings prevailed in Indiana, and that legislation to overcome the same was in the interest of the public welfare of the citizens of

the State of Indiana. Findings Nos. 27-36 inclusive. (R. pages 66-72.)

It was evident to the legislature from the decisions of the courts that the usury laws were inadequate to cope with the cost of credit in transactions of this character, and it was equally evident that the legal device of time price, based as it is upon the right to sell merchandise at any price parties may agree upon, could not be left untouched if any remedy was to be provided for the factual situation revealed above. It was, therefore, reasonable for the legislature to enter the field of fixing the cost of credit.

Griffith v. Connecticut, 218 U. S. 563;
Munn v. Illinois, 94 U. S. 113;
Brass v. North Dakota, 153 U. S. 391;
German Alliance Insurance Co. v. Lewis, 233 U. S. 389;
Hall v. Geiger-Jones Co., 242 U. S. 539;
Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S. 238 at p. 245;
Nebbia v. People etc., 291 U. S. 502.

5. Since the purpose of the legislation is valid and within the exercise of the police power of the state, due process is not denied by legislation authorizing the fixing of maximum finance charges, maximum delinquency charges and minimum discounts on prepayment for use in retail installment sales, as provided in sections 6 and 26 of the Act.

The plan of the statute was to start at the point where the legal device of time-price leaves off, thereby permitting the parties to fix the price of merchandise where they pleased, and requiring as a condition to the right to discount the paper, the

sale thereof only to persons who have been licensed to buy such paper.

Nebbia v. People etc., 291 U. S. 502;
German Alliance Insurance Co. v. Lewis, 233 U. S. 389 at p. 413;
Munn v. Illinois, 94 U. S. 113;
Griffith v. Connecticut, 218 U. S. 563;
Dillingham v. McLaughlin, 264 U. S. 370.

6. The decisions of the courts have uniformly held that the differential between what a seller may choose to sell goods for cash and what the same seller may choose to sell the same goods for on credit is not interest nor within the prohibition of the usury laws, but no court has held, so far as appellants know, either in these decisions or in any construction of the due process clause of the Fourteenth Amendment, that the usury laws are the uppermost limits to which a state may go in advancing the general prosperity and welfare of its citizens through control of the cost of credit. Neither the novelty of the method of regulation made necessary to meet new situations, nor the absence of precedent will influence the court in determining whether a law lacks due process.

Munn v. Illinois, 94 U. S. 113;
Nebbia v. People etc., 291 U. S. 502 at p. 536.

7. The rights of property and liberty guaranteed to the appellee by the due process clause of the Fourteenth Amendment are not absolute, but are subject to the right of the public to limit them in the common interest.

Nebbia v. People etc., 291 U. S. 502 at p. 523;
Munn v. Illinois, 94 U. S. 113;

Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co., 284 U. S. 151 at p. 157;
Advance-Rumely Co. v. Jackson, 287 U. S. 283.

8. The record wholly fails to show that the Act under consideration deprives appellee of its property or liberty without due process of law, and the court in the decision of a constitutional question will not enter into the field of speculative effects upon persons other than parties to the action.

Engle v. O'Malley, 219 U. S. 128;
Blair v. U. S., 250 U. S. 273 at p. 279.

9. The provisions of the Act are reasonably suited to effect its purpose and are not unreasonable, arbitrary or capricious. That being true, the policy of the legislation is for the legislature and not for the court. Having arrived at the conclusion that the state in the exercise of its police power has the right to fix maximum charges for credit extension in the cases applicable to appellee, the necessity of enforcing the limitations imposed is apparent. If the state cannot make legislative provision adapted to enforce such a right then the right itself is impotent. Sections 9, 10, 11 and 15(d) are not only adapted to the purpose of carrying out the finance charge provisions of the Act, but are absolutely essential thereto. They are, therefore, valid upon the principle that the purpose being proper such acts as are reasonably necessary to carry it out are likewise proper and within the scope of the state's exercise of the police power.

Nebbia v. People etc., 291 U. S. 502 at p. 537;
Mutual Loan Co. v. Martell, 222 U. S. 225;
Advance-Rumely Co. v. Jackson, 287 U. S. 283.

10. The very essence of the business regulated is discount and the very essence of the plan of regulation is the control of

the discount. Section 11 which requires finance companies to have a license, section 18 which requires annual reports from licensees, and sections 19 and 20, which invest the department with authority to examine the business of licensees to discover violations and obtain information with which to fix charges under the Act and to assess and collect the cost of examination are a part of a definite and articulate plan of regulation bearing a reasonable relation to the prevention of extortionate and hidden charges in retail installment contracts in which a finance company may become interested.

Griffith v. Connecticut, 218 U. S. 563;
Mutual Loan Co. v. Martell, 222 U. S. 225;
Nebbia v. People, etc., 291 U. S. 502.

11. It is not a valid objection that the Act attacked deprives the appellee of due process of law in violation of the Fourteenth Amendment because it violates Section 1 of Article 4 of the State Constitution. Moreover, appellee is not in position to raise the question. However, the Act does not violate said provision of the Indiana Constitution.

Blue v. Beach, 155 Ind. 121;
State, ex rel., v. Beil, 157 Ind. 25 at p. 29;
Isenhour v. State, 157 Ind. 517;
Wallace v. Feehan, 206 Ind. 522 at p. 532.

ARGUMENT.

1. The findings of fact show that the business regulated by Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of Indiana is a proper subject of regulation by the State in the exercise of its police power.

The business regulated is that of extending credit to retail buyers in installment sales of merchandise. In order to effect the regulation the Act prescribes the form of contract which must be used by the retail buyer and seller; authorizes the fixing of maximum finance charges, maximum delinquency charges and minimum discounts; requires the parties to exhibit the agreed price of the merchandise in the contract; provides for the licensing and regulation of finance companies and restricts the right of the retail seller to sell and the right of the finance company to buy retail installment contracts in order that the maximum charges and minimum discount may be made effective.

Appellee McHenry Chevrolet Co., Inc., challenged the Act as applied to it. Findings 3 to 19, inclusive, describe how appellee conducts its business and particularly its retail installment sales.

The company has been engaged in the business of selling automobiles at retail in the city of Indianapolis, Indiana, since it was organized in 1933, R. page 49. New and used automo-

biles are sold. The automobiles are sold at retail for cash or on the installment plan. On the latter plan, a written contract of purchase and sale is executed in which, among other things, the price of the automobile, as fixed by agreement between the parties, is stated. In the contract used by appellee prior to the enactment of the Retail Installment Sales Act the price which the parties had agreed upon for the automobile was known as the "time price." Sixty per cent (60%) to sixty-five per cent (65%) of the company's total sales of new and used automobiles have been installment sales and the automobiles sold have been of a cash price less than $1500, R. page 49.

Appellee has always sold its installment sales contracts to General Motors Acceptance Corporation of Indiana, Incorporated, and desires to continue to do so. R. page 52. The latter corporation was organized in 1929 to buy and deal in contract obligations and similar choses in action, but it purchases contracts only from sellers of manufactured products of General Motors Corporation. In the findings General Motors Acceptance Corporation of Indiana, Incorporated, was referred to as GMAC and for convenience will be so referred to herein. R. page 48.

The appellee conducts its sales on a basic price for a cash sale and the price is fixed either by the manufacturer or by its desire for profit as modified by the factors of competition. When it has an opportunity to sell an automobile on installment, it does so pursuant to an installment selling plan widely in use in Indiana by retail sellers of automobiles and other merchandise. The plan was promulgated by GMAC. The

form of contract and other materials are supplied by the latter company. The contract on its face calls for the payment of the price of the merchandise less any down payment and provides for retention of title in the company to secure the payment. The price paid in the contract is determined according to the rate charts and other material in use under the GMAC plan. R. pages 50, 52-57.

To determine the price in an installment sale under the GMAC plan the appellee is first required to ascertain the amount the buyer can pay in cash. This amount is deducted from appellee's basic price, however determined, thus leaving an unpaid balance. The next step in the plan is to find out the number of months the buyer will want for payment. With the amount remaining to be paid (unpaid balance) thus fixed and the time desired for payment known, appellee applies the rate chart furnished by GMAC and is informed what amount must be added to the unpaid balance in order for it to sell the contract to GMAC and realize therefrom an amount equal to the unpaid balance. The amount shown on the rate chart to be added to the unpaid balance, under the GMAC plan, is known as "the time price differential." The price of the automobile may then be fixed by appellee as the sum of the down payment, the unpaid balance and the time price differential and the form of contract provided by GMAC may then be executed. R. pages 54-57, 58.

The contract calls only for the payment of a lump sum, designated as "the total time price." It does not disclose any amount charged for insurance or for cost of financing and, even though the buyer might learn, upon inquiry, the amount of the time

price differential used by McHenry Chevrolet Co., Inc., in arriving at the total time price, it was practically impossible for the buyer to know the cost of financing because the insurance cost might not be known to the parties. R. pages 50, 66, 67.

Other retail sellers in Indiana whether selling automobiles or other merchandise use substantially similar contracts and compute their prices in installment sales in substantially the same way. R. pages 60-63.

Findings 20 and 21, and 25 to 37 inclusive, recount the facts and matters which persuaded the General Assembly of Indiana that legislation fixing maximum finance charges, maximum delinquency charges and minimum discounts in installment sales and making those charges and discounts effective was necessary to the public welfare of the citizens of Indiana. R. pages 60-63, 65-72.

At the time of the legislation not less than 140 finance companies were doing business in Indiana. All of them were engaged in buying retail installment contracts and the plan of each was similar to that of GMAC. Every retail seller who sold goods of any sort on the installment plan was a potential source of business to the finance companies. So far as the record goes, no retail seller was under obligation to sell his retail installment contracts to any particular finance company. The fact is unmistakable that every seller had many finance companies competing for the privilege of purchasing the retail installment contracts arising from his installment sales. GMAC did business only with retail sellers who sold manufactured products of General Motors Corporation, but most of the 140 finance com-

panies refrained from purchasing contracts only when the terms were not satisfactory to them.

Every finance company doing business in Indiana maintained an office organization, equipment and personnel to carry on its business and set-up accounts and records for the contracts purchased by it. The companies all furnished retail sellers with data essentially identical with that which GMAC furnished to retail sellers of General Motors Corporation, although many of the companies had different rate charts for the same car, whether new or used. The forms of contracts provided by these companies were essentially identical with that furnished by GMAC. R. pages 60-63.

All of the companies did business on a discount basis when buying installment contracts. This simply meant that they paid the retail seller something less than the face amount of the contract. The amount of the discount was fixed by each company in its rate charts and was variously called "time price differential" or "finance charge." The retail seller knew that ordinarily he would be paid an amount for his contract equal to the difference between its face amount and the discount provided in the rate charts. R. pages 57, 58.

Extortionate Charges. The variation in amount of discount for twenty companies in Indiana on the identical unpaid balance of $300 on the purchase of a new automobile on installments for one year ranged from $28 to $60. In terms of interest, based upon the diminishing unpaid balance, these discounts ranged from 18.7% to 44.4% per annum. On used automobiles for the same unpaid balance for the same period of time, the

amount of discount ranged from $35 to $85.20. The latter discounts, computed in terms of interest upon the diminishing unpaid balance, ranged from 23.9% to 69% per annum. The amount of the discount on furniture was generally higher. On radios the discount was higher than either furniture or automobiles. On automobile tires the discount expressed in terms of interest and computed on the diminishing unpaid balance, ranged from 33.6% to 106.1% per annum. (R. pp. 67, 68.)

Installment sales of radios, electric goods and refrigerators amount to approximately 6½% of all retail installment sales in Indiana and installment sales of furniture amount to approximately 13% of the total. The ratio of automobile installment sales to all such sales is more than 60%. The amount of automobile tire installment sales is negligible. R. page 68.

The amount of the discounts which various companies fix in their rate charts represent the factors of cost, expense, loss hazard, capital investment, depreciation, insurance for the retail buyer and profit. The evidence does not disclose the proportion of these elements for any company.

The Department of Financial Institutions which is charged with the enforcement of the challenged Act made an investigation of consumer credit agencies, including finance companies, and recommended legislation requiring that the cost of credit extension in installment sales be separated from the cost of insurance and that the former be expressed in terms of a rate per cent per month based upon the diminishing unpaid balance of the price of the merchandise. This was recommended so that the purchaser would have a basis on which to compare cost of credit in installment sales with cost of credit from direct lending agencies. (R. pp. 69, 70.)

The finance companies had always done business on a discount basis as described above and it may be that the legislature deemed the provisions for maximum charges and minimum discounts in connection with the provisions requiring the parties to exhibit the agreed price of the merchandise, the down payment, the insurance cost and finance charge would provide a comparative cost basis.

Reserves, Bonus, Rebate and Pack. "Reserves" usually refer to an amount paid the seller out of the discount on a contract. (R. p. 59.) The reserve is contracted for between the seller and the finance company, either by general agreement, if he sells most of his contracts to a particular finance company, or by special agreement when each contract is sold. The theory of the reserve is that the dealer should be compensated for the loss hazard he is under. (R. p. 70.)

The GMAC plan includes a reserve in the discount for the loss hazard incurred by GMAC, as well as for the dealer. (R. p. 64.) The amount of the reserve which GMAC agrees to set aside for the retail seller is so fixed as to be sufficient, in the case of the average seller of manufactured products of General Motors Corporation, to cover all losses and provide an additional margin over losses in excess of the actual loss experience. (R. p. 59.)

Under the GMAC plan, the dealer is liable on a limited recourse agreement. The amount of reserve is credited to the dealer in a reserve account maintained by GMAC in the dealer's favor and is paid to the dealer from time to time as an amount is accumulated in the account. (R. p. 59.)

"Bonus" also refers to an amount paid the seller out of the

discount on a contract. Sometimes it is referred to as "Dealer's Bonus" or "Dealer Participation." The names eloquently describe the character of the item. The finance companies purchase the paper without any recourse whatsoever on the seller, but the companies pay the seller a part of its discount. The bonus is part of the arrangement when the paper is bought. It may be paid in cash by paying the seller more than his unpaid balance, or it may not be paid until collected from the buyer. GMAC does not pay a bonus. R. p. 65.

Some of the finance companies doing business in Indiana pay "rebates" to retail sellers that sell their contracts to that finance company. The rebate is a certain amount in cash paid to the retail seller on each contract which the particular finance company accepts. It is distinguished from the reserve and bonus in that it is paid without reference to the discount or collection of the contract and goes to the retail seller without any restrictions whatsoever. The evidence does not disclose amounts paid as rebates. R. p. 70.

The "pack" exists only in the case of installment sales of automobiles. The practice is for the seller to add to the discount shown in the rate chart an additional amount known as "pack." The retail buyer is not informed that the item is not part of the discount required by a finance company, but on the contrary may be led to believe that the whole amount added to the unpaid balance, the sum total of the pack and the discount, is retained by the finance company. In practice, the finance company collects, but does not retain the pack. The dealer collects the amount from the finance company at the time he sells the contract or, in some instances, after the contract has been fully paid the amount is credited to the reserve account of the dealer with the finance company. The common range of packs is from

$10 to $25, although in some instances, it may reach $40 or more. R. pp. 70, 71.

It is significant that all of the charges, whether cost of financing, insurance, reserve, bonus, rebate or pack, have the common characteristics of being included in the discount added to the basic price by the retail seller and being unknown, as to amount, to the retail buyer. However legitimate the charges for insurance, cost of financing and reserve may be the inseparability of the items as they appear in a single unit makes it impossible for the retail buyer to know whether he is paying more for insurance and more for financing than he would have to pay from other available sources of credit. The character of the items of rebate, bonus and pack is such that the buyer not only has no means of knowing the amount of each of them, but probably does not suspect that they exist. Furthermore, neither of the parties on the other side of the bargain can inform him that the items do exist or what is the amount of them. The finance company, in order to avoid any implication of usury, maintains a cool aloofness in regard to the transaction between the retail seller and retail buyer, however genuine in fact its affection for the retail seller may be. The retail seller, in order that his "selling policies" may not be compared with competitors, acknowledges no intimacy with the finance company that will purchase the buyer's contract.

In the final analysis the selling policy referred to in finding No. 29 must mean only that the retail seller, through the medium of the discount facilities provided by the finance company has an unfair weapon in negotiations between the seller and the buyer to establish the basic price on which the discount will be predicated. If the seller fixes a low price for the merchandise and adds the difference in the discount, whether an additional

amount for rebate or pack is added or not, whatever equality of bargaining power theretofore existed between the seller and buyer has been robbed of its efficacy. R. p. 71.

Whether the citizens of Indiana are unusually sensitive to the refinements of business negotiations is not shown by the record. That they are only average in their discernment may be assumed. It is not difficult to see that the only element restraining the seller and finance company from relieving the buyer of his bargaining power within the variable limits offered by the buyers credit and the security value of the goods is the extent to which the seller and the finance company will cooperate with one another.

Other elements of the business of installment selling. The forms of contract supplied to retail sellers by finance companies generally contain no provision for a return of any part of the "finance charge" or "time price differential" if the buyer prepays the contract. As opposed to the lack of prepayment provision every contract provides for interest on overdue installments to the extent permitted by the laws of the State, and in Indiana the extent is 8% per annum.

The report of The Department of Financial Institutions did not deal with delinquency charges as such or prepayment provisions, as they are provided for in this Act, because its recommendation that the finance charge be stated as a rate per cent per month on the unpaid diminishing balance automatically took care of both items. R. p. 72.

In addition to delinquency charges some finance companies require a reinstatement fee, collect amounts on account of letters sent or acts done in connection with the collection of delinquent installments, and charge transfer fees when a condi-

tional vendee sells his equity to another person and the latter desires to continue payment in accordance with the provisions of the conditional vendee's contract. Methods of enforcement of these fees which are not ordinarily provided for in the contract evidencing the sale vary, but are sometimes enforced by refusal to deliver the certificate of title held by the finance company in pursuance of the retention of title in the original conditional sale contract. R. p. 72.

The foregoing facts read in connection with the provisions of the challenged Act reflect the purpose of the legislation with such clarity that denial is impossible. It is not conceivable that the members of the General Assembly of Indiana were unaware of the facts disclosed in this regard. The report of The Department of Financial Institutions was before them and many of the abuses were set out and a remedy suggested. Even without the report it cannot be assumed that the General Assembly was without independent knowledge of the circumstances surrounding the extension of credit in retail installment sales in Indiana. No declaration of purpose is contained in the Act, but every provision is pointedly directed to correction of an abuse disclosed by the record. The validity of the purpose of this legislation has been recognized by the courts throughout the range of the common law. Even for merchandise, an unreasonable price is not permitted where the parties have not agreed. If they have agreed, the price will not stand in the face of fraud. The concern of this Act is a reasonable price for credit and what may be represented as credit fixed by the parties within the maximum limits prescribed by the State and under conditions reasonably free from the possibility of unfair practice.

2. It is not the purpose of the Act to fix the price of any

goods sold by a retail seller nor can the Act be so construed as to exhibit such an intention of the legislature.

There is no provision in the Act under consideration which purports to fix or to authorize the Department to fix the price of any merchandise which may become the subject matter of a retail installment sale. The Act only provides that the price agreed upon by the parties for the merchandise be set out in the written instrument required by Sections 2 and 4. In most instances the written instrument will be a conditional sales contract. Whatever price is finally agreed upon by the parties must be set out in the conditional sales contract and is the "cash price" as that term is defined in the Act.

In the court below appellee insisted that the effect of the Act is to fix the terms and prices and the manner in which retail sellers might sell and conduct their sales of automobiles at time prices payable in installments. It was asserted that the parties to a contract of sale which is finally made as an installment sale never agree upon a cash price, and that, therefore, no cash price can be stated nor can the parties be required to agree upon a cash price. It is obvious that the contention was based on the premise that the term "cash price" as used in the statute means the price a seller would have sold his goods for had the sale been one for cash on delivery. It is equally obvious that the term "cash price" was not defined in this way. The language of the statute is sufficiently clear to resolve any doubts on the matter. It says that "cash price" means the price the parties agree upon for the goods. This neither means that the parties are required to agree upon a price which would have been satisfactory to each of them had the sale been for cash on delivery, nor does it mean that the parties must agree upon a price in rela-

tion to any other terms of the bargain which might be considered by them. Prior to the challenged Act appellee had characterized the price fixed by the agreement of the parties as the time price. Now the statute requires it to characterize the price so fixed as the "cash price." The statute does no more than this by its definition. The right of the seller to name the price at which he chooses to sell is not put in issue by this definition. That right is most carefully preserved.

This court will presume that the legislature was acquainted with its decision in Hogg v. Ruffner, 66 U. S. 115, and with the decision of the Supreme Court of Indiana in Newkirk v. Burson, 28 Ind. 435. Both courts held that a vendor could sell merchandise at a higher price on credit than he had fixed for the same merchandise when payment was to be cash and not violate the usury laws. It is reasonable to assume that the legislature was acquainted with the administrative difficulties which would have been encountered by the courts had a different result been reached in either case. The courts had and now have no adequate means for ascertaining what price a vendor would have sold goods for cash when he has, in fact, sold them on credit and hardly more adequate means of ascertaining when a vendor has raised his price for the sole purpose and with the intent of taking excessive interest.

Whether the courts bottomed the decisions in the cases mentioned on the administrative difficulties involved or whether they preferred to rest on the principal that a man may set his own price, whether for cash or for credit, it must be assumed that the legislature was acquainted with the results of the cases. It would have availed the legislature nothing in its effort to protect the welfare of the citizens of Indiana in the situations presented by

the facts to require sellers to fix a price for goods involved in a credit transaction upon the basis that the goods were to be sold in a cash transaction and thereafter add the amount to be charged for any credit extended. Such a requirement would have been so indefinite as to be incapable of determination thereby inviting disapproval on the ground of administrative difficulties alone. More serious, it would have put the right of the seller to name his price in issue.

On the other hand, the legislature knew that it could require the parties to a contract for the sale of merchandise to make it in writing and could require the parties thereto to state the price they had agreed upon. It was equally clear that no insuperable administrative difficulties were involved for the courts when questions were presented concerning the price which the parties had agreed upon. Furthermore, the price agreed upon could be a bona fide credit price or "time price," as appellee is pleased to call it, fixed without reference to the price that would have been charged had the sale been for cash. It will be presumed that it was with knowledge of the foregoing situation that the legislature defined the term "cash price" as it is used in the Act under consideration.

On the meaning of the term "cash price" as we construe it, the net effect of the contention of the appellee may now be stated. It is that the provisions of the Act which require every retail seller to execute a written contract to evidence the sale and to show the price that parties have agreed upon for the merchandise are provisions fixing the price of the merchandise. Clearly, the price fixing objected to is not price fixing by statute. If the term price fixing is applicable at all, the grievance of appellee is that it is price fixing by contract.

In connection with the problem of usury as it has been dealt with by the courts when presented in cases involving sales we commend to the court's attention an article by Raoul Berger entitled "Usury in Installment Sales" in Volume II, Law and Contemporary Problems, pages 148-172.

3. The foregoing construction of the provisions of the Act which require the parties to a retail installment contract to put the agreed price in the written contract made to evidence the sale operates as a complete avoidance of any pitfalls that may be involved in the case of an attempt to fix the price of merchandise generally. Furthermore, it is a complete answer to any contention that the right of the seller to name the price at which he may choose to sell his goods is put in jeopardy.

If objection be made to our construction of the provisions of the Act under discussion that objection is fully met by the principle that this court, in the construction of a statute will, if possible, give it that construction which is in harmony with constitutional limitations. Panama R. Co. v. Johnson, 264 U. S. 375; Crowell v. Benson, 285 U. S. 22. In the latter case, an award made under the Congressional Longshoremen's and Harbor Workers' Compensation Act was attacked on the ground that the administrative authority conferred violated the due process clause of the Fifth amendment. To the particular objection that the findings of an administrative officer were made final and not reviewable by the courts, this court replied that the statute should not be so construed because a constitutional construction was permissible. At page 62, the court said:

> "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court

will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. We are of the opinion that such a construction is permissible and should be adopted in the instant case. The Congress has not expressly provided that the determinations by the deputy commissioner of the fundamental or jurisdictional facts as to the locality of the injury and the existence of the relation of master and servant shall be final."

4. The judgment of the General Assembly of Indiana that regulation of the business of installment selling was necessary to the prosperity and well being of its citizens is vindicated by the circumstances. The usury laws were inadequate and the state of economic development made it imperative that consumer credit be maintained on a fair basis to the consumer.

It is a matter of common knowledge that all citizens require means of obtaining money, property or service upon credit. The record is sufficient evidence of the fact in that 60% of all automobiles are sold on the installment plan. Like other products now in common use in the routine process of living the automobile has progressed from the state of a mere personal pleasure to an instrument, in many instances, of prime necessity. Suburban cities have come. Factories have removed from congested city limits with no fear for a limited labor supply. The automobile has become an integral part of the nation's transportation system.

The record demonstrates the cash means of the major portion of the families of Indiana and the imperative requirement for credit, if those families are to possess goods of a retail price of $1500 or less. There is no pretense that this Act was de-

signed to protect only small wage earners or necessitous persons whose resources frequently must be combined in order to borrow $300. On the other hand, it is not to be denied that persons of this class are the potential buying strength on which the used car, used radio and used furniture markets depend. However, persons will benefit from the protection afforded by this Act, even though they have sufficient cash means to make a down payment in an installment sale equal to $500. The beneficiaries of the intervention are those who, in the course of obtaining economic necessities and conveniences, as well as pleasures, may pledge their earnings to the payment of a debt created under a business arrangement developed to permit the extension of credit without customary limitations and devoid of the opportunity for scrutiny and comparison.

It has always been a favorite method of defeating usury laws to clothe the transaction in the form of a sale. Mutual Loan Company v. Martell, 222 U. S. 225. States have imposed limitations upon sales of wages by restricting rights of assignment and by declaring the differential between the sale price and the amount of the wage to be interest.

The facts found in the court below and summarized under Point 1 of this argument show the circumstances which moved the General Assembly to pass the challenged Act. Apart from the findings which particularly outline the manner in which retail sellers conduct sales of automobiles, the substance is that abuses exist in the business regulated and that the abuses arise out of and depend upon the sale of credit through a third party. The same abuses apparently exist in other States. They have been the subject of investigation in Wisconsin, (See Report of the State Banking Commission and Interim Advisory Legisla-

tive Committee to Investigate Finance Companies, 1935) and Massachusetts (See Report of the Special Commission Established to Investigate the Advisability of Providing for the Licensing and Regulation of the Business of Financing Purchases of Certain Personal Property, January, 1936). The device has proven so attractive that its forms have been resorted to by some banks for some loans. (See The Wall Street Journal, February 21, 1936, page 5, column 1.)

It was evident to the legislature that usury laws were inadequate to cope with the factual situation presented to it and that its power must be exercised if the evils of installment selling were to be overcome for the citizens of Indiana.

5. While not the only remedial feature of the Act, it is nevertheless true that the provisions authorizing the fixing of maximum finance charges, maximum delinquency charges and minimum discounts on prepayment as provided in sections 6 and 26 are of its very essence. It is quite important, therefore, that this right be sustained if the major purpose of the legislation is to be accomplished.

We have predicated our proposition that the provisions of the Act under consideration authorizing the fixing of maximum finance charges, maximum delinquency charges and minimum discounts on prepayment are valid on the premise that it is done in the exercise of a proper legislative purpose which is the promotion of the general welfare of the people of Indiana. Based upon that premise, the only requirement is that the means employed to accomplish the purpose be reasonable and have a substantial relation to the object sought to be attained. As said by the court in Nebbia v. People etc., 291 U. S. 502 at page 525:

> "The guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

The above provisions clearly meet this requirement. What other method more adapted to the correction of the evils found to exist in the financing through finance companies of retail installment selling could be devised than to apply the regulation to the thing in which the evil to be corrected inheres. The method employed by this Act is not only adapted to the accomplishment of the purpose of the Act but, leaving out mere details which, of course, may vary, is probably the only method which is adequate and complete. The restriction of sales of such contracts to licensees, which provision will doubtless be attacked, is obviously necessary to carry out the general purpose of the Act to limit finance charges since otherwise the corrective features of the Act would be violated with impunity.

6. Certain it is that the ordinary usury statutes are not adapted to carry out the purpose of the legislature as evidenced by said Act. The appellee in the past has manifested a spirit of smug complacency in the security found in the authorities dealing with usury statutes and retail installment sales. But these authorities prove too much and what they do not prove is as significant as what they *do* prove. First, they prove too much. They prove, if they prove anything at all, that the usury laws are impotent to cope with the evils both actual and inherently possible in modern financing of retail installment selling. Second, they *do not* prove that the usury statutes are the only available cure for such evils.

As early as Munn v. Illinois, 94 U. S. 113 at p. 133, it was said:

> "Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress."

And later, in Nebbia v. People etc., 291 U. S. 502 at page 536, after referring to numerous decisions where regulations affecting businesses of varying character were upheld, the court said:

> "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory."

It is very true that under the authorities, the differential between what a seller may choose to sell goods for at cash and what he may choose to sell the same goods for on credit is not interest, but it does not, for that reason, follow that such charges involved in modern financing of retail installment selling,—a subject which in recent years has been under the scrutiny of at

least three legislative investigating committees and of numerous others of a more or less private character,—it does not follow that such charges, in which the public generally is so manifestly interested, may not become the subject of regulation and limitation. Modern methods of financing retail installment selling present an entirely new situation requiring an entirely new treatment in the interest of the general welfare. That is what the Act under consideration accomplishes, we insist, within constitutional limitations.

7. Nothing is better settled than that the rights of property and liberty guaranteed by the Fourteenth Amendment are not absolute but are subject to the right of the public to limit them in the common interest. The numerous decisions cited in the opinion of the court in Nebbia v. People, etc. *supra* attest the wide variety of cases to which the principle above announced applies. It applies to interest charges; (Griffith v. Connecticut, 218 U. S. 563) it applies to storage charges in public warehouses; (Brass v. North Dakota, 153 U. S. 391) it applies to fire insurance premiums; (German Alliance Insurance Co. v. Lewis, 233 U. S. 389) it applies to insurance agents' compensation; (O'Gorman & Young v. Hartford Ins. Co., 282 U. S. 251) it applies to attorney's fees in certain cases; (Frisbie v. United States, 157 U. S. 160) it applies to banking and kindred types of business; (Dillingham v. McLaughlin, 264 U. S. 370) and to many others. For other cases see the case of Nebbia v. People etc., 291 U. S. 502. Why may not the principle with equal propriety apply to finance companies engaged in the business of financing retail installment selling, if the legislature determines upon a policy of their regulation? Is it because the finance charge is not interest? Is it because it disturbs the nomenclature of "time-price"? Neither, we submit, is sufficient to deprive the state

of the right to meet the new conditions with new measures designed to advance the general welfare, and that is all this Act does. It accepts the rulings of the past; but it does not stop there. It meets the conditions of the present system with the appropriate measure to safeguard the public.

8. Sections 9, 10 and 15(d) of the Act are of the utmost importance in the consideration of the method of regulation provided by it. We will consider them somewhat analytically in our discussion of subdivision 9 of the *Summary of Argument.* Before doing so, however, we desire to state our view of the limitations of the inquiry under the present circumstances. We think it is well settled that such constitutional questions as the court will consider are those only which affect the *appellee's* rights. The court, in the determination of the question of the constitutionality of a law, will not enter into the field of speculative effects and especially where the parties to the action are not shown by the record to be affected.

Engle v. O'Malley, 219 U. S. 128;
Blair v. U. S., 250 U. S. 273 at p. 279.

9. A consideration of sections 9, 10, 11 and 15(d) of the Act are now in order. We think we are justified in saying that finance companies, foreseeing that some sort of regulation of their business is inevitable, have sought to avoid any effort to fix maximum finance charges, and one of their common arguments, other than the constitutional objection, has been the argument that such a regulation can not be enforced. Sections 9, 10, 11 and 15(d) are designed to meet that argument, and hence are attacked with all the force that can be brought to bear. Briefly stated, section 9 prevents retail sellers from selling, assigning or transferring retail installment contracts to any person other than a licensee

under the Act. This, of course, is not a limitation upon the licensed finance company but it is a limitation upon the right of the retail seller to sell his retail installment contract. We take it that the question here, as always in such cases, is: Is the limitation a reasonable one to accomplish a valid legislative purpose? We have already discussed the question as to whether the legislative purpose is a valid one and for that reason will not again discuss it here, assuming for the purpose of this argument, that such legislative purpose is valid. Upon that basis we think the limitation provided by section 9 is not only reasonable but wholly justified. In arriving at that conclusion the transaction regulated is necessarily considered as an entirety as constituting a particular method of doing business rather than separately as to its several steps. The combined relationships between the retail seller, the retail buyer and the finance company constitute a method of doing business peculiar to itself. There is involved in it the sale of merchandise, the sale of contracts, the furnishing of capital and the extension of credit. And while there is nothing in the transaction that in a strict sense can be called the loan of money, the net result or effect of it is the loan of money. There is nothing in the Act which limits the retail seller, except as to the form of the contract, if he chooses to finance his business himself. But when he chooses to use the finance company in this new device for the extension of credit he must use it within the limitations provided by the Act. The Constitution does not guarantee to the retail seller the unrestricted right to conduct his business as he pleases, Nebbia v. People etc. *supra*, and if the legislature finds in the combined methods of the retail seller and the finance company a condition detrimental to the general welfare, there is no constitutional provision which prevents a limitation reasonably

suited to remedy the evil. Mutual Loan Co. v. Martell, 222 U. S. 225. The provision of section 9 is such a limitation. There would clearly be no efficacy in providing for the licensing of finance companies if retail sellers could, with impunity, sell to an unlicensed company; and without the licensing provision of section 11, enforcement would be impossible.

Section 10 provides, among other things, that any licensee may purchase any retail installment contract on such terms and conditions not inconsistent with the provisions of the Act and at such price and upon such terms as to the payment of the price as may be agreed upon between the licensee and the retail seller. The portion, however, to which objection is made is the portion which provides that:

> "No licensee shall enter into any agreement with any retail seller regarding the purchase of any retail installment contract whereby the retail seller shall receive, directly or indirectly, any benefit from or part of any amount collected or received from any retail buyer, as a finance charge or as the cost of the insurance to the retail buyer, in excess of an amount fixed and determined by the department and no licensee shall directly or indirectly pay any part of the amount collected as a finance charge or retail buyer's cost of insurance to any retail seller on any retail installment contract purchased from him in excess of the amount so fixed; and the department shall fix such maximum amount which may be so paid but without regard to any differentiation as to whether the retail installment contract is sold to the licensee with recourse on the seller in the event of the default of the buyer or without such recourse or

under an agreement by which the seller agrees to repurchase the specific goods described in the retail installment contract if such buyer in such contract defaults and such goods are repossessed."

It is recognized that there is a certain loss hazard in retail installment selling and that the item designated "reserve" as a part of the finance charge is a legitimate item when limited to the reasonable requirements to meet such hazard. On the other hand, it is believed to be clear that the retail seller should realize his profit from the merchandising transaction *only*, and that the finance company should receive all profits derived from the financing transaction. In the past these reserves included in the finance charge depending upon the method of operation have usually been sufficiently large to enable the finance company to return a part of it to the retail seller in some form of "dealer participation," which has been used as a bargaining item of the finance company for the dealer's business, *at the expense of the retail buyer*. As we have said, a "reserve" for losses is a legitimate item to be taken into consideration in fixing a finance charge whether fixed by the unregulated finance company or by some public agency authorized to fix it; but when it becomes too large as fixed by the unregulated finance company it becomes one of the abuses to correct which the Act under consideration was passed. It was necessary, therefore, to authorize the Department to fix maximum loss reserves which might be allowed in the final analysis to the finance company or to the retail seller according to their respective interests.

The objection that this item must be fixed without regard to any differentiation as to whether the retail installment contract is sold to the licensee with recourse or without recourse is with-

out any merit since the amount to be fixed is a maximum sufficient to meet any type of contract between the retail seller and the licensee, leaving the reserve to be divided between the retail seller and the finance company according to their agreement based upon their respective liabilities.

Section 15(d) deals with the grounds for revocation of licenses of licensees. It provides as follows:

> "The department is hereby authorized to revoke or suspend any license issued under this act, if, after hearing, it finds:
>
> * * *
>
> (d) that the licensee has wilfully avoided or attempted to avoid the operation or effect of this act by purchasing any retail installment contract or contracts at a less price than the unpaid balance thereon or by entering into any agreement, combination or understanding (,) expressed or implied (,) with any retail seller the effect of which agreement, combination or understanding may be to avoid or attempt to avoid the operation or effect of this act.
>
> The department shall give any licensee whose license it proposes to revoke ten days' notice in writing of the contemplated action and of the general grounds therefor. Before the license is revoked or suspended, the licensee shall be given reasonable opportunity to be heard. Licensee (license) may be revoked or suspended only by written order. If the department finds that the grounds for revocation or suspension of the license are applicable only to one branch or some branches operat-

ed by the licensee, it may revoke or suspend the license as to that branch or those branches only, or it may revoke the right of the licensee to do business as a licensee in this state. No revocation or suspension or surrender of any license shall impair or affect the obligation of any lawful retail installment contract theretofore made."

It seems to us that this provision and section 11 are not objectionable and are reasonably necessary to carry out the purpose of the Act. It does not forbid the purchasing by licensees of retail installment contracts at a less price than the unpaid balance. It is only where the licensee has wilfully avoided or attempted to avoid the provisions of the Act by so doing that this is a ground for revocation of a license. The provision is not designed to restrict or limit the right of contract between the retail seller and the finance company as expressly provided in section 10 of the Act, and to which reference has already been made, but where the device of buying at a less price than the unpaid balance is used to violate the provisions of the Act and the regulations of the Department of Financial Institutions fixing maximum finance charges which may be contracted for, it then becomes a ground for revocation of license. In other words, the device of buying for less than the unpaid balance can not lawfully be used as a means of increasing the maximum finance charge *which the retail buyer must pay* and in whose interest the fixing of a maximum finance charge is made, and when the Department finds that has been done, it may, after a hearing, revoke or suspend the license of the offending licensee. But except for that, the Department has no interest so far as the above provision is concerned in the contract between the *retail seller* and the licensee. The limitation, therefore, is not unreasonable and is simply for the purpose of preventing the

charging against the retail buyer by indirection of a finance charge which could not be charged against him directly.

IN CONCLUSION.

In the absence of a written opinion by the lower court showing specifically the provisions of the Act upon which the decision is based, we have had some difficulty in determining the exact scope of the inquiry. We have, however, sought to discuss those provisions which might conceivably bear upon the question of due process, the ground stated in the conclusions of law as the basis for the decree. Any summary of the discussion would be of little value unless the same be somewhat extended, and an extended summary would necessarily be a restatement of much that has already been stated. For that reason we will not attempt a summary, contenting ourselves with a simple outline.

First. The facts abundantly show that retail installment selling and the extension of credit involved therein through the instrumentality of selling retail installment contracts to finance companies is a proper subject of regulation under the police power of the State.

Second. The challenged Act in recognition of the futility of any attempt to shape usury statutes so as to effectually regulate such business, adopted the plan of providing for the fixing of maximum finance charges, which bears a similar relation to the established method of financing retail installment sales as interest bears to the forebearance of money, upon such a basis as would protect the retail installment buyer from unreasonable prices for credit in addition to providing for a disclosure of such charges and their several items and upon such a basis as

would insure sufficient capital for the purpose of supplying such credit.

Third. The method adopted by the General Assembly of Indiana is reasonably adapted to the purpose of the Act and is not arbitrary or capricious.

Fourth. The classifications made by the Act are reasonable and not subject to constitutional objection.

Fifth. The limits of and basis for the exercise of power by the Department of Financial Institutions is sufficiently definite to meet any constitutional objections and its actions are expressly made subject to judicial review.

Sixth. The Act challenged does not violate the Fourteenth Amendment.

For the foregoing reasons it is respectfully submitted that this cause should be reversed.

Respectfully submitted,

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Assistant Attorney General of Indiana,

LEO M. GARDNER,
Solicitors for Appellants.

APPENDIX "A".

CHAPTER 231.

(H. 377. Approved March 11, 1935.)

AN ACT to license and regulate and to promote competition in the business of purchasing contracts arising out of retail installment sales, to prescribe the form of such contracts, to empower the department of financial institutions to classify retail installment sales and contracts arising therefrom and to fix and prescribe maximum charges for the extension of credit in retail installment sales.

SECTION 1. Definition of Terms.—*Be it enacted by the general assembly of the State of Indiana,* That in this act, unless the context or subject matter otherwise requires:

The term "retail installment sale," or the plural thereof, means and includes every retail contract to sell specific goods and every retail sale of specific goods to any person:

(a) In which the cash price of the goods is not in excess of $1,500, and may be paid in installments over a period of time, and,

(b) In which the seller has taken or retained a security interest in the goods.

The term "person" includes a corporation or partnership or (of) two or more persons having a joint or common interest.

The term "goods" includes all chattels personal other than money, things in action, emblements, industrial growing crops, things so affixed to the land as to become a part thereof, or

things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

The term "specific goods" means goods identified and agreed upon at the time a contract to sell or a sale is made.

The term "retail" means to dispose of specific goods to, or to acquire specific goods by, a person who may consume such goods for his personal use.

The term "buyer" means a person who buys or agrees to buy goods, or any legal successor in interest of such person.

The term "retail buyer" means a buyer who is a party to a retail installment sale, or any legal successor in interest of such person, and includes any person who as surety, indorser or guarantor or otherwise is liable on the obligation created by any retail buyer on any retail installment contract.

The term "seller" means a person who sells or agrees to sell goods.

The term "retail seller" means a seller who is a party to a retail installment sale.

The term "cash price" means the price, measured in dollars, agreed upon in good faith by the parties for the specific goods which are the subject matter of any retail installment sale.

The term "retail installment contract" means any written instrument, lawful under this act, which is executed in connection with any retail installment sale and is required by section 2 hereof or is authorized by section 3 hereof, and the term may include all such instruments executed in connection with any retail installment sale.

The terms "contract to sell," "sale" and "conditional sale" shall have the same meaning in this act as they are respectively defined in the Uniform Sales Act and Uniform Conditional Sales Act.

The term "conditional sales contract" means any written instrument evidencing a conditional sale.

The term "bank or trust company" means any national banking association formed under the laws of the United States with its principal office located in this state and doing business herein and any bank or trust company, any bank of discount and deposit, loan and trust and safe deposit company or trust company organized and doing business under the provisions of any law of this state.

The term "department" means "The Department of Financial Institutions."

The term "manufacturer" means a person who is engaged, directly or indirectly, in the manufacture or distribution of specific goods which may become the subject matter of a retail installment sale in this state.

The term "finance charge" means any consideration which the retail buyer contracts to pay the retail seller for the privilege of paying the principal balance in installments over a period of time.

The term "security interest" means a property interest in goods which are the subject matter of a retail installment sale, limited in extent to securing performance of some obligation of the retail buyer or of some third person to the retail seller and includes the interest of a mortgagee of the goods and the title

to the goods whether or not expressed to be absolute, whenever such title is, in substance, retained for security only.

SEC. 2. Written Instrument.—Every retail installment sale shall be evidenced by an instrument in writing signed by the retail buyer, and a copy thereof shall be delivered to him by the retail seller at the time of its execution. An acknowledgment of the delivery thereof contained in the body of the instrument shall be conclusive proof of delivery in any action to enforce any obligation arising out of the retail installment sale. The written instrument shall contain all of the agreements of the parties made with reference to the specific goods which are the subject matter of the retail installment sale, and shall set forth specifically all items and matters required by this act. The reference to insurance shall recite generally the type or types of insurance the retail seller has agreed to procure for the retail buyer but such reference to insurance shall not be construed to imply the scope of the coverage, the terms, exceptions, limitations, restrictions or conditions of the contract or contracts of insurance to be furnished. Nothing in this act shall be construed to require the retail seller to comply with the provisions hereof at any time prior to the delivery of the specific goods to the retail buyer.

SEC. 3. Retail Installment Contracts.—Any retail seller may require any retail buyer to execute and deliver a promissory note to evidence the indebtedness created by any retail installment sale, and, to secure the payment of the indebtedness created by the sale or evidenced by the promissory note or to secure the performance of any other condition of the sale, may require the retail buyer to execute and deliver a conditional sale contract, chattel mortgage or other instrument to give the retail

seller a security interest in the specific goods which were the subject matter of the retail installment sale. A written instrument required by section 2 hereof may evidence a conditional sale.

SEC. 4. Provisions of Written Instruments.—Every written instrument evidencing a retail installment sale shall recite the following separate items as such and in the following order:

(1) The cash price of the specific goods.

(2) The amount in cash of the retail buyer's down payment, whether made in money or goods or partly in money or partly in goods.

The term "down payment" for the purpose of this section, shall mean that part payment of the cash price required by the retail seller as a condition to the delivery of the specific goods sold or to be sold or to the extension of credit to the retail buyer for any portion of the cash price.

(3) The unpaid balance of the cash price payable by the retail buyer to the retail seller which is the difference between items (1) and (2).

(4) The cost to the retail buyer of any insurance the retail buyer has agreed to procure, if the retail seller has agreed to purchase the insurance and extend credit to the retail buyer for the price thereof.

(5) The principal balance owed on the retail installment contract which is the sum total of items (3) and (4).

(6) The amount of the finance charge.

(7) The time balance owed by the retail buyer to the retail seller and the number of installment payments required and

the amount and date of each payment necessary finally to pay the time balance which is the sum total of items (5) and (6).

Item (4) and item (6) may be added together and stated as one sum in the written instrument and if so stated item (5) may be omitted, but in such event the retail seller shall, within twenty-five days after the making of the retail installment contract, mail to the retail buyer at his address as shown on the retail installment contract a statement reciting the separate amounts of items (4) and (6).

SEC. 5. The Insurance.—Any retail seller who, in any retail installment contract, has agreed to purchase insurance for the retail buyer and to extend credit for the price thereof, shall, within twenty-five days after the making of the retail installment contract, mail to the retail buyer at his address as shown on the retail installment contract, a policy or policies of insurance or in lieu thereof a certificate briefly describing the protection afforded by the insurance procured, and the kind and amount thereof. If the premium for insurance of like kind and amount, as fixed in the published manual of a recognized standard rating bureau designated by the retail seller, is less than the amount charged the retail buyer as fixed in the written instrument in compliance with item (4) of section 4 hereof, the retail buyer may deduct an amount equal to the difference from the amount of the last payment owed the retail seller. If, before the sale, assignment or transfer of the retail installment contract, the retail seller has not purchased the insurance for the retail buyer which the former, under the terms of the retail installment contract, is required to purchase, any licensee hereunder who becomes the owner, assignee or transferree of the retail installment contract shall, within twenty-five days after the execution of the

assignment, purchase the insurance and mail the policies or certificates, instead of the retail seller as required above, and may, subject to the provisions of this section, collect and receive the amount of the cost thereof which was included as a part of the principal balance on the retail installment contract.

SEC. 6. The Finance Charge and Prepayment.—Subject to the provisions of this act, any retail seller at the time of making any retail installment sale may contract for the payment of a finance charge by the retail buyer and collect and receive the same. The finance charge contracted for in any retail installment contract may not exceed the maximum finance charge then authorized by the department as in this act provided. Every retail buyer shall have the right, at any time, to pay the then unpaid time balance owed on any retail installment contract, whether then due or not, and upon payment thereof, any holder of the retail installment contract shall reduce the amount of the then unpaid time balance by the amount fixed and determined in accordance with the regulations of the department in force as of the date of the making of the particular retail installment contract and applicable to such cases. The reduction herein authorized may be known as a discount and every retail buyer, upon full prepayment of any unpaid time balance owed by him on any retail installment contract, shall receive the discount but only in the amount, at the times and upon the conditions provided herein. The department shall and is hereby authorized to fix and determine the amount of any discount to be given for prepayment as in this section authorized but no such discount shall be for an amount in excess of the amount of the finance charge on any particular retail installment contract.

Every retail seller may, at the time of making any retail

installment sale, contract for the payment by the retail buyer of lawful delinquent charges for failure to pay any installment of the time balance on the date specified in the retail installment contract, and any retail seller or any lawful holder of a retail installment contract in which delinquent charges are contracted for may collect and receive the charges lawfully contracted for.

SEC. 7. Limitation on Amount of Debt and Charges.—No retail installment contract authorized by section 3 of this act which is executed in connection with any retail installment sale shall evidence any indebtedness in excess of the time balance fixed, in the written instrument in compliance with item (7) of section 4 of this act, but it may evidence in addition, any agreements of the parties including agreements for the payment of delinquent charges, taxes and fees, including attorney's fees. No retail seller, directly or indirectly, shall contract for or receive from any retail buyer, as consideration for the extension of credit to the retail buyer for the amount of the principal balance, any further or other amount whatsoever for examination, service, brokerage, commission, expense, fee or other thing of value than the finance charge, charges and fees permitted by this act, taxes on account of any retail installment contract or on specific goods sold thereunder and any lawful fees actually paid out by the retail seller to any public officer for filing or recording or releasing any instrument securing the payment of the obligation owed on any retail installment contract. The lawful fees may be collected when the retail installment contract is made or at any time thereafter, but may not be included in the principal balance fixed in the written instrument in compliance with item (5) of section 4 hereof.

SEC. 8. Limitation on Recovery and Enforcement of Lien.—

No retail installment contract which evidences an indebtedness greater than allowed by section 7 hereof and no retail installment contract in connection with which any charge prohibited by this act has been contracted for or received shall be enforceable against any retail buyer for any amount in excess of the principal balance thereof and no security interest created by any such retail installment contract in connection with which an indebtedness is evidenced which is greater than allowed by section 7 hereof or in connection with which any charge prohibited by this act has been contracted for or received shall be enforceable for an amount in excess of the principal balance against any retail buyer in default under the terms of the retail installment contract.

SEC. 9. Limitation on Assignment of Contracts.—Except as in this section otherwise provided, every retail installment contract shall be assignable and the interest therein transferable to any person or persons. No retail seller may sell, assign and transfer any retail installment contract to any person other than a licensee under this act. Any retail installment contract which is or has been owned by a licensee may be enforced and collected by the holder thereof according to its lawful terms.

SEC. 10. Purchase of Retail Installment Contracts.—Any licensee hereunder may purchase any retail installment contract on such terms and conditions not inconsistent with the provisions of this act, and at such price and upon such terms as to the payment of the price, as may be agreed upon between the licensee and the retail seller. The records of the licensee shall show the price actually paid for retail installment contracts separately assigned to such licensee but retail installment contracts may be assigned in group or in bulk to any licensee as may from

time to time be authorized by the department by regulation without disclosing the purchase price of the individual retail installment contracts. The department is authorized to make regulations from time to time concerning the purchase by licensees of retail installment contracts in group or in bulk and any purchase of such retail installment contracts made within the terms of the regulations shall not be construed as an attempt to avoid the operation and effect of this act.

No licensee shall enter into any agreement with any retail seller regarding the purchase of any retail installment contract whereby the retail seller shall receive, directly or indirectly, any benefit from or part of any amount collected or received from any retail buyer, as a finance charge or as the cost of the insurance to the retail buyer, in excess of an amount fixed and determined by the department and no licensee shall directly or indirectly pay any part of the amount collected as a finance charge or retail buyer's cost of insurance to any retail seller on any retail installment contract purchased from him in excess of the amount so fixed; and the department shall fix such maximum amount which may be so paid but without regard to any differentiation as to whether the retail installment contract is sold to the licensee with recourse on the seller in the event of the default of the buyer or without such recourse or under an agreement by which the seller agrees to repurchase the specific goods described in the retail installment contract if such buyer in such contract defaults and such goods are repossessed.

The provisions of this section shall not apply to any bona fide loan made to any retail seller which the retail seller is under an unqualified duty to repay as such, and which he has secured as to payment, by the sale, assignment, or transfer of retail installment contracts to the lender.

SEC. 11. Licensees.—No person shall purchase retail installment contracts from a retail seller doing business in this state or engage in the business of purchasing retail installment contracts from retail sellers doing business in this state or, unless a bank or trust company, make loans to a retail seller doing business in this state on the security of retail installment contracts or engage in the business of making loans to retail sellers in this state on the security of retail installment contracts unless the department has licensed such person to do such business and has issued to the person a written instrument evidencing the license as in this act provided. Any person who desires to purchase retail installment contracts from retail sellers doing business in this state or to engage in the business of purchasing retail installment contracts from retail sellers doing business in this state or, unless a bank or a trust company, to make loans to retail sellers doing business in this state on the security of retail installment contracts or to engage in the business of making loans to retail sellers doing business in this state on the security of retail installment contracts, shall file an application for a license on forms prescribed by the department and pay the fees required herein.

SEC. 12. Application for License and Fees.—The application for license shall contain:

(a) the name and address of the principal office of the applicant,

(b) if applicant has one or more branches operating in this state, the place of business of each such branch at the date of the application,

(c) the trade name, if any, under which applicant's business is to be conducted, and if applicant is a co-partnership, the

name of every member thereof, and if a corporation, of each officer and director thereof,

(d) the total authorized investment used or to be used in the business in this state and if a corporation, the amount of the capital stock thereof issued and outstanding,

(e) a statement of the total amount of business transacted by it in this state during the fiscal year next preceding the date of the application,

(f) such other information touching the business of the applicant as the department may require.

The department is hereby authorized to prescribe the forms of the application and require such additional information as to it may seem necessary properly to regulate the business of the licensee. The forms prescribed shall require the applicant to agree to give notice to all retail sellers in this state with which it does business, when requested so to do by the department, of any and all orders which the department may make respecting classes of retail installment sales or contracts or maximum finance charges as provided in section 26 of this act and to keep in this state, subject to examination, adequate records pertaining to the business done in this state.

The application shall be verified by the proper person and every applicant, other than a bank or trust company or an industrial loan and investment company authorized to issue certificates of indebtedness or investment, shall pay the department the sum of one hundred dollars as an annual license fee at the time of the filing of the application. Any bank or trust company or industrial loan and investment company authorized to issue certificates of indebtedness or investment which

shall apply for a license under this act shall pay the department the sum of ten dollars as an annual license fee at the time of filing of the application. If the period for which the license is to run is less than six months (,) one-half of the annual fee shall be charged. On or before the 20th day of June in each year every licensee shall pay the department the annual license fee provided herein for such licensee for the year commencing on the next succeeding July 1 and shall file an application in the form prescribed by the department. All license fees collected by the department shall be paid into the state treasury and become a part of the financial institution's fund and subject to the provisions of law relating thereto.

SEC. 13. Approval or Rejection of Application.—Upon the filing of any application for license and the payment of the license fee required by this act, if the department shall find that the applicant can operate its business economically and efficiently, it shall thereupon issue and deliver a license to the applicant. In considering economic and efficient operation the department shall take into consideration the fact that this act is designed to promote competition between licensees for the benefit of the class of retail buyers within its scope. The license shall authorize the applicant to do the business otherwise prohibited by this act. The license shall remain in full force and effect until it is surrendered, revoked or suspended as in this act provided. If the department shall find that the applicant cannot operate its business economically and efficiently within the scope of this act, it shall not issue a license to the applicant but shall notify the applicant of the denial, and return to the applicant the fee theretofore paid. The department shall give every applicant a reasonable opportunity to be heard with respect to the application, and shall approve or deny, by written

order, every application for license hereunder within thirty days from the hearing thereon.

SEC. 14. Form of License.—The instrument evidencing the license shall be in such form as may be prescribed by the department, and in addition thereto shall contain the following:

(a) the name of the person licensed,

(b) the name of all partners if applicant is a co-partnership,

(c) the principal office of the applicant.

The instrument evidencing the license, or a certified copy thereof provided by the department, shall be kept posted conspicuously in the principal office of applicant and in every branch maintained and operated by applicant in this state.

SEC. 15. Revocation of License.—The department is hereby authorized to revoke or suspend any license issued under this act, if, after hearing, it finds:

(a) that the licensee has refused to permit the department to make any examination authorized hereunder or has failed to pay the cost of any examination made by the department or the annual license fee required hereby or any penalty assessed by the department against the licensee, or

(b) that the licensee has wilfully failed to comply with any rule or regulation of the department lawfully made hereunder, or

(c) that the licensee has wilfully violated any provision of this act, or any rule or regulation of the department lawfully made hereunder, or

(d) that the licensee has wilfully avoided or attempted to avoid the operation or effect of this act by purchasing any retail installment contract or contracts at a less price than the unpaid balance thereon or by entering into any agreement, combination or understanding (,) express or implied (,) with any retail seller the effect of which agreement, combination or understanding may be to avoid or attempt to avoid the operation or effect of this act.

The department shall give any licensee whose license it proposes to revoke ten days' notice in writing of the contemplated action and of the general grounds therefor. Before the license is revoked or suspended, the licensee shall be given reasonable opportunity to be heard. Licensee (license) may be revoked or suspended only by written order. If the department finds that the grounds for revocation or suspension of the license are applicable only to one branch or some branches operated by the licensee, it may revoke or suspend the license as to that branch or those branches only, or it may revoke the right of the licensee to do business as a licensee in this state. No revocation or suspension or surrender of any license shall impair or affect the obligation of any lawful retail installment contract theretofore made.

SEC. 16. Recourse to Court.—Any person feeling aggrieved with any decision of the department made as in this act provided may commence an action in the circuit or superior court of the county in which the business operated by such person is located against said department as defendant to vacate or set aside any such order or decision of the department upon the grounds that any such regulation, order or decision of the department is insufficient, unreasonable or unlawful, in which ac-

tion a copy of the complaint shall be served with the summons. The answer of the department to the complaint shall be filed within ten days after service of summons. All such actions shall have precedence over civil cases not of the same nature pending in any such court and such circuit or superior court shall always be deemed open for the trial thereof and the same shall be tried and determined as other civil actions.

Any such proceeding, action or suit to set aside or vacate any decision or order of the department or to prevent in any way such order or decision from becoming effective shall be commenced and every right of recourse to the courts shall be exercised within thirty days after the entry or rendition of such order or decision and the right to commence any such action, proceeding or suit or to exercise the right of any recourse to the courts shall terminate absolutely at the end of such thirty days after such entry or rendition thereof. Either party to any such action in the circuit or superior court shall have a right of appeal to the supreme court of the State of Indiana, as in other civil cases.

SEC. 17. Surrender of License.—Any licensee hereunder may surrender any license theretofore issued to it by the department at any time after ten days' notice to the department in writing stating that the licensee proposes to and does thereby surrender the license as of a certain effective date named. The surrender of a license by a licensee shall not affect the civil or criminal liability or liability for fees or penalties which the licensee may be under by virtue of any act done prior to the surrender of the license.

SEC. 18. Reports of Licensees.—Every licensee hereunder

shall annually on or before the 15th day of March file a report with the department giving such relevant information as the department may require concerning the business and operation of the licensee in this state during the preceding calendar year. The report shall be made under oath and in the form prescribed by the department.

SEC. 19. Examination of Licensees.—The department may at any time investigate the business done in this State by any licensee hereunder, and for that purpose examine the books, accounts, records and files used and maintained by such licensees and their agents, brokers or other representatives. The department may also investigate the business of any person who is not a licensee hereunder and who is doing any business or act, the doing of which is prohibited hereby to persons other than licensees or banks or trust companies. For the purpose of discovering violations of this act and procuring information necessary to fix a maximum finance charge applicable to retail installment contracts, the department in making investigations authorized by this section shall have access to all books, accounts, papers, records, files, safes and vaults of any persons being examined, and may require such persons to attend and testify relative to any transactions or business which may come within the scope of this act. In case of the disobedience on the part of any person to comply with any lawful order of the department or any lawful subpœna, or upon the refusal of any witness to appear and testify to any matter regarding which he may be lawfully interrogated, upon petition of the department setting forth the facts, it shall be the duty of the circuit or superior court of the county of which such person is a resident, or the judge thereof in vacation, to compel obedience to the lawful requirements of the subpœna or order and to compel the

production of necessary and required books, papers, records, documents and other evidence, and upon the failure, refusal or neglect of any person to comply with the order of the court or the judge thereof, such person shall be punished as for contempt of court.

SEC. 20. Costs of Examination.—The department shall prescribe and fix a schedule of fees, which are hereby imposed and shall be charged and collected by the department, for the services rendered and the duties performed by the department, under and by virtue of the provisions of this act in the supervision, regulation and examination of licensees hereunder and the schedule of fees so prescribed and fixed shall be determined in accordance with the provisions of section 35 of the Indiana Financial Institutions Act. For the purposes of this section a licensee hereunder shall be termed a financial institution. The fees fixed and prescribed in the schedule may include the cost incurred by the department in fixing a finance charge under the provisions of this act. No licensee shall be required to pay any fee for examination unless the cost to the department of making such examination shall exceed the license fee paid in compliance with the provisions of this act. All costs assessed by the department at the time of the making of any examination and paid by the licensee shall be paid into the State treasury and become a part of the financial institutions fund and subject to the provisions of law relating thereto. If any licensee refuses to permit the department to make an examination it shall be subject to such penalty as the department may assess, not in excess of one hundred dollars for each day any such refusal shall continue. Any penalty assessed by the department may be collected in an action brought in the name of the State of Indiana on the relation of "The Department of Financial Institutions" in the

circuit or superior court of the county in which the licensee has its principal place of business.

SEC. 21. Contracts to Prevent Competition.—No manufacturer shall sell or contract to sell specific goods which may become the subject matter of a retail installment sale in this State, whether patented or unpatented, to any retail seller in this State on the condition or with an agreement or understanding, express or implied, that the retail seller shall sell, assign or transfer any retail installment contracts arising from the retail installment sales of the goods, or any part thereof, only to a designated licensee or class of licensees, when the effect of the condition, agreement or understanding may be to lessen or eliminate competition, or create, or tend to create, a monopoly in the licensee or class designated. Any such condition, agreement or understanding with any retail seller in this State is hereby declared to be against the public policy of this State and to be unlawful and void.

SEC. 22. Acts Tending to Prevent Competition.—Any threat, express or implied, made directly or indirectly, to any retail seller in this state by any manufacturer that the manufacturer will discontinue or cease to sell, or refuse to enter into a contract to sell, or will terminate a contract to sell, specific goods which may become the subject matter of a retail installment sale in this state, whether patented or unpatented, to the retail seller, unless the retail seller sells, assigns or transfers the retail installment contracts arising from his retail installment sales to any designated licensee or class of licensees, shall be prima facie evidence that the manufacturer has sold or intends to sell such specific goods on the condition or with the agreement or understanding prohibited by section 21 hereof.

SEC. 23. Further Acts Tending to Prevent Competition.—Any threat, express or implied, made directly or indirectly to any retail seller in this state by any licensee hereunder that is affiliated with or controlled by any manufacturer that the manufacturer will terminate his contract with or cease to sell specific goods which may become the subject matter of a retail installment sale to the retail seller unless the retail seller sells, assigns or transfers the retail installment contracts arising from his retail installment sales to the licensee making the threat, shall be presumed to be made at the direction of and with the authority of the manufacturer and shall be prima facie evidence of the fact that the manufacturer has sold or intends to sell the specific goods on the condition or with the agreement or understanding prohibited by section 21 hereof.

SEC. 24. Subsidy of Licensees.—No manufacturer shall pay or give or contract to pay or give any thing or service of value to any licensee in this state, and no licensee in this state shall accept or receive or contract or agree to accept or receive, directly or indirectly, any payment, thing or service of value from any manufacturer, if the effect of the payment or giving of any such thing or service of value by the manufacturer, or the acceptance or receipt thereof by the licensee, may be to lessen or eliminate competition or tend to create or create a monopoly in the licensee that accepts or receives the payment, thing or service of value or contracts or agrees to accept or receive the same.

SEC. 25. Rules and Regulations.—The department shall have authority from time to time to make, amend and rescind rules and regulations necessary to carry out and enforce the provisions of this act, including rules and regulations governing the

business done in this state by licensees, the content of reports required from licensees and the manner and extent of examinations made of the business of licensees. Among other things, the department shall have authority to prescribe forms in which required information shall be set forth, items or details to be shown in balance sheets and earning statements and methods to be followed in the preparation of accounts necessary to reflect factors in the business of the licensee to be reckoned with by the department when fixing a maximum finance charge on retail installment contracts. The rules and regulations of the department, other than those issued pursuant to the authority vested in the department by section 26 of this act, shall be published and be effective in the manner and at the time prescribed by the department. No provision of this act imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the department, notwithstanding that the rule or regulation may, after the act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

SEC. 26. Classification of Retail Contracts and Variable Finance Charges.—It shall be the duty of the department and the department shall have power, jurisdiction and authority to investigate retail installment contracts and ascertain the facts with reference to retail installment sales and upon the basis of the ascertained facts:

(a) to classify, by general order, retail installment sales or retail installment contracts arising therefrom, according to such system of differentiation as may reasonably distinguish the classes of retail installment sales or the contracts made in connection with such sales, and

(b) to determine and fix by a general order the fair maximum finance charge that may be contracted for in any retail installment contracts or that may be contracted for in retail installment contracts of any classes which may be established by the department, and

(c) to determine and fix by a general order the fair maximum charges that may be contracted for in any retail installment contract and which may be imposed upon the retail buyer for failure to pay any installment of the time balance when it is due.

The department, in determining the classes of retail installment sales or contracts, shall take into consideration the specific goods sold thereunder, the use thereof, the length of time usually given to the retail buyer in which to pay the unpaid balance owing on any retail installment contracts made in connection with the sales and any other factors which may reasonably afford a basis for the application of different finance charges on retail installment contracts which have or are likely to have the same or substantially the same unpaid balances.

The department, in determining the fair maximum finance charge which may be contracted for in any retail installment contracts or in any retail installment contracts of any classes which may have been established by it, shall take into consideration the availability of credit facilities to individuals who do not have the security generally required by commercial banks and the finance charge which will be necessary in order to induce sufficient amounts of efficiently operated commercial capital to enter into the business of making and purchasing retail installment contracts. The department shall fix charges sufficient

to provide adequate credit facilities for retail installment sales.

The department may, from time to time, upon the basis of changed conditions or facts, reclassify retail installment sales and retail installment contracts, and redetermine and refix any maximum finance charge previously fixed by it, but the new finance charge shall not affect pre-existing retail installment contracts lawfully made. Any and all orders which the department may make respecting classes of retail installment sales or contracts or maximum finance charges shall fix the effective date of the new or changed classification or finance charge, but the effective date shall not be earlier than thirty days after the date when notice of such new or changed classification or finance charge is published. Notice to the public, to retail sellers and to licensees hereunder shall be given by publication of the new or changed classification or finance charge by one publication in a daily newspaper of general circulation printed and published in the English language in the city of Indianapolis. In addition, the department may require licensees hereunder to give notice of such new or changed classification or finance charge to all retail sellers with whom the licensees do business in this state.

Any finance charge fixed by the department under the provisions of this act shall be lawful notwithstanding any other law of this state.

SEC. 27. Duty of Retail Seller and Licensee.—Every person to which this act is applicable shall conduct and transact his business in the manner required hereby and every licensee hereunder shall establish and maintain methods for the conduct of his business and affairs coming within the scope of this act in accordance with the requirements hereof and of any rule or reg-

ulation of the department made in relation thereto and under the authority of this act.

SEC. 28. Waiver of Statutory Protection.—No agreement of any retail buyer before or at the time of the making of any retail installment contract shall constitute a valid waiver of any provisions of this act.

SEC. 29. Violation of Act—Punishment.—Any person who wilfully violates any of the provisions of this act, or the rules and regulations promulgated by the department under the authority hereof or any person who wilfully in any report or account filed in pursuance of any provision of this act or rule or regulation of the department makes any untrue statement of a material fact or omits to state any material fact necessary to give the department the information lawfully required by it, shall upon conviction, be fined not more than one thousand dollars or imprisoned not more than one year or both.

SEC. 30. Interpretation.—This act shall be interpreted and construed in connection with and as supplemental to the Uniform Sales Act, as amended, and the Uniform Conditional Sales Act and any terms used in this act which are defined in either of said acts shall have the meaning given thereto by the aforementioned acts unless the context hereof clearly requires another meaning. Nothing in this act shall be construed to repeal any part of either of the acts mentioned in this section or any existing law of this state relating to interest or consideration that may be charged upon the loan, use or forbearance of money or sale of credit, but this act shall be construed as supplemental thereto.

SEC. 31. Existing Contracts.—None of the provisions of this act shall apply to any sale or to any contract to sell made prior

to the taking effect of this act which if made after this act takes effect would be a retail installment sale or contract and this act shall not affect pending litigation.

SEC. 32. Captions.—No caption of any section of this act shall in any way affect interpretation of this act or any part thereof.

SEC. 33. Severability Clause.—If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

SEC. 34. Short Title.—This act may be cited as the Retail Installment Sales Act.

SEC. 35. Time of Taking Effect.—This Act shall take effect on the first day of July, 1935.